No. 86-218

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DALE WALKER, et al.,

Petitioners,

v.

CHARLES ROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the due process clause provides a remedy to a government employee for injuries sustained in the scope of employment which would not be available to a private sector employee?

2. Whether respondents would be entitled to a qualified immunity from liability for civil damages?

3. Whether state post-deprivation remedies, including workers compensation benefits, provide petitioners with an adequate post-deprivation remedy?

LIST OF PARTIES

The Petitioners are: Dale Walker, Sharon Patchett, Danny Dill, The Estate of William Thomas, The Estate of Stanley Cole, and The Estate of Robert Conkle.

The Respondents are: Charles Rowe, then Director of the Illinois Department of Corrections; and David Sandahl, then Assistant Warden of Operations of the Pontiac Correctional Center.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 791 F.2d 507 (7th Cir. 1986). The opinions of the District Court were correctly cited in petitioners' brief. (Petition at 2).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is properly invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have correctly quoted the constitutional and statutory provisions involved in this case.

STATEMENT OF THE CASE

Petitioners' statement of the case omits several significant facts. This case was brought by six Illinois Correctional Officers or their estates, who were injured or murdered in the line of duty, by rioting inmates at the Pontiac Correctional Center on July 22, 1978. Each of the six correctional officers voluntarily accepted employment at the Pontiac Correctional Center and were free to terminate their employment at any time. Each of the six correctional officers received training from the Illinois Department of Corrections including riot training. The correctional officers were aware of the risks associated with their chosen profession.

The petitioners each pursued a variety of state remedies including workers' compensation and statutory remedies for disabilities or death in the line of duty. Petitioners also unsuccessfully brought suit against the State of Illinois in the Illinois Court of Claims. After pursuing these remedies, petitioners then brought suit under 42 U.S.C. Section 1983 against the then Director of the Illinois Department of Corrections, Charles Rowe; then Assistant Warden of Operations of the Pontiac Correctional Center, David Sandahl; and other correctional officials who were dismissed prior to or at the trial of this case.

Petitioners claimed that respondents violated their fourteenth amendment due process rights as they failed to provide petitioners with a safe workplace. The jury heard considerable evidence, often disputed by the petitioners, that the Pontiac Correctional Center was a reasonably safe male maximum security prison and that the riot which occurred was neither predicted nor predictable.

ARGUMENT

I.

THE DUE PROCESS CLAUSE DOES NOT PROVIDE A REMEDY TO A GOVERNMENT EMPLOYEE FOR INJURIES SUSTAINED IN THE SCOPE OF THE EMPLOYMENT WHICH WOULD NOT BE AVAILABLE TO A PRIVATE SECTOR EMPLOYEE.

The Seventh Circuit Court of Appeals has held below that the Constitution is not a code of occupational safety, and therefore government employees are not entitled to affirmative protection under the due process clause, from hazards in the workplace. *Walker v. Rowe*, 791 F.2d 507, 508 (7th Cir. 1986). The Seventh Circuit distinguished this case from the line of cases whose roots extend to *Estelle v. Gamble*, 429 U.S. 97 (1976), which hold that where the State takes someone into its care or cuts off private aid, the State must provide replacement protection or services.

The *Walker* Court reasoned that since petitioners voluntarily accepted employment as correctional officers on terms which were presumably acceptable to them, and since petitioners were free to terminate their employment at any time, no affirmative duty existed under the Constitution to provide protection. The decision of the Seventh

Circuit Court of Appeals is clearly correct and should not be reviewed for this reason.

Petitioners erroneously contend that the protections of the due process clause are implicated merely by virtue of their status as government employees. In contrast, a private sector employee, subject to the identical hazards in the workplace, would not be entitled to protection under the due process clause. It is patently obvious that the due process clause was not intended to provide government employees with protections superior to those of private sector employees.

The only feature distinguishing this case from an ordinary tort action brought by an employee against an employer, is the identity of the employer. *McClary v. O'Hare*, 786 F.2d 83, 89 (2nd Cir. 1986). Section 1983 was not intended to be a font of federal tort law to be imposed upon the tort law systems of the States. *Paul v. Davis*, 424 U.S. 693, 701 (1976). This is precisely the result which would be achieved if the Court accepts petitioner's argument.

Should the Court hold that the due process clause protects government employees from hazards in their workplace, it would be creating a Federal Workers' Compensation system in the District Courts for all employees of governmental units. Such a holding would effectively neuter the workers' compensation schemes of the states which provide that an employee's exclusive remedy against an employer for an injury sustained in the scope of employment, is workers' compensation benefits. Cf. *McClary v. O'Hare*, 786 F.2d at 85. Under such a holding, government employees could circumvent the exclusive remedy provisions. Such a holding would also wreak havoc on the dockets of the District Courts and create grave economic concerns for governmental entities.

The exclusive remedy provision of the workers' compensation schemes of the States is a well recognized principle of tort immunity. This Court has upheld the constitutionality of these provisions. *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 162-3 (1919). "Section 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

II.

THERE IS NO EXISTING CONFLICT BETWEEN TWO CIRCUIT COURTS OF APPEALS NOR IS THERE SUBSTANTIAL CONFUSION CONCERNING THE DUTY TO PROVIDE AFFIRMATIVE PROTECTION.

Every Circuit Court of Appeals which has been presented with the issue raised by petitioners in this case has held that the due process clause does not create a duty on the part of a government employer to provide affirmative protection to government employees in the workplace. See: *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986); *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986); and *Hayes v. Vessey*, 777 F.2d 1149 (6th Cir. 1985).[1] No conflict currently exists among any two Circuit Courts of Appeals on this issue. Therefore the Court should not review the decision of the Seventh Circuit Court of Appeals in this case.

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[1] The Sixth Circuit in *Hayes v. Vessey* was presented with the question of whether state post-deprivation remedies satisfied due process. In deciding this question, the *Hayes* Court had to assume the existence of a duty and it held that the state remedies satisfied due process. Therefore the *Hayes* Court did not reach the underlying question addressed by the Seventh Circuit in *Walker v. Rowe*, 791 F.2d at 507.

Petitioners erroneously contend that a conflict exists between the *Walker* decision and a District Court decision from the Western District of Pennsylvania, *P.L.C. v. Housing Authority of County of Warren*, 588 F.Supp. 961 (W.D. Penn. 1984). (Petition at 8). Even if a conflict did in fact exist between the decision of the Seventh Circuit Court of Appeals and a decision of a District Court in the Western District of Pennsylvania, this would not be a sufficient reason to grant the petition.

Further, the *P.L.C.* decision is distinguishable as it is not in conflict with the Seventh Circuit's decision in *Walker*. The Court in *P.L.C.* found that a special relationship existed between the plaintiff and the defendant Housing Authority officials because the plaintiff was assaulted by an agent of the Housing Authority and not by a third party. *Id.* at 588. In *Walker*, the petitioners were not assaulted by agents of the respondents. They were assaulted by inmates "and this makes all the difference." *Walker v. Rowe*, 791 F.2d at 509.

Contrary to petitioners' assertion, the decision of the Seventh Circuit Court of Appeals in *Ellsworth v. City of Racine*, 774 F.2d 186 (7th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1638 (1986), does not stand in "marked contrast" with the *Walker* decision. (Petition at 9). In *Ellsworth* the Seventh Circuit held that no special relationship existed between the wife of a police officer and the municipality which employed the officer. *Id.* In dicta to the opinion, the *Ellsworth* Court noted that there *may* be situations where a special relationship might exist by virtue of an employment relationship. *Id.* at 186. However, the *Ellsworth* Court was not presented with this question and did not decide it. This dicta in the *Ellsworth* decision does not create a conflict with the Seventh Circuit's decision in *Walker*. Even if this were construed to

be a conflict, an intra-circuit conflict is not sufficient grounds for the Court to review the *Walker* decision.

Petitioners' contention that the law regarding a governmental entity's duty to provide affirmative protection to citizens from assaults by third parties is in considerable disarray, is without merit. (Petition at 11). Circuit Courts which have been presented with the question have either disposed of the case on the basis of a lack of causation or have held that no duty existed. Circuit Courts which have decided cases on a causation theory have universally relied on the Court's decision in *Martinez v. California*, 445 U.S. 920 (1980), which held that the actions of a parole board in releasing a parolee who murdered the plaintiff were too remote of a consequence to hold the parole board members liable under Section 1983. E.g. *Humann v. Wilson*, 696 F.2d 783 (10th Cir. 1983).

Circuit Courts which have decided cases under a duty analysis, have recognized the general principle that there is no duty to provide affirmative protection in the absence of a special relationship between the parties. See: *Jackson v. Byrne*, 738 F.2d 1443, 1146-9 (7th Cir. 1983); *McClary v. O'Hare*, 786 F.2d 83, 88 (2nd Cir. 1986); *Jones v. Phyfer*, 761 F.2d 643, 645-7 (11th Cir. 1985); *Fox v. Custis*, 712 F.2d 84, 87-90 (4th Cir. 1983); *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986). These decisions are rooted in the decision of the Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), which held that the eighth amendment requires the states to exercise some care in affording medical assistance to prisoners. The theory behind these cases is that "when the state takes someone into its care or cuts off sources of private aid, the state must afford replacement protection." *Walker v. Rowe*, 791 F.2d at 511.

In analyzing whether a special relationship exists the Circuit Courts have considered whether the government has taken someone into its care or custody, or has cut off private sources of aid or defense from foreseeable risks. *Id.* While the parameters of what constitutes a special relationship have not been set in stone, the Circuit Courts have consistently followed this analysis.

III.

ALTERNATIVELY, RESPONDENTS ARE ENTITLED TO A QUALIFIED IMMUNITY FROM LIABILITY FOR MONEY DAMAGES.

It is well settled that public officials, such as the respondents in this case, are entitled to a qualified immunity from liability for civil damages if their conduct did not violate any clearly established right of the petitioners. *Mitchell v. Forsyth*, ____ U.S. ____, 105 S.Ct. 2806, 2818-20 (1985). The central question under the qualified immunity analysis is whether petitioners had a clearly established right under the fourteenth amendment due process clause to affirmative protection in the workplace, from the criminal acts of inmates, as of July 22, 1978, the date of the occurrence. *Davis v. Scherer*, ____ U.S. ____, 104 S.Ct. 3012, 3018 (1984).

No Court has held prior to July 22, 1978 that a government employee has a constitutional right to affirmative protection from the criminal acts of third parties in the employee's workplace. Thus the respondents would be entitled to a qualified immunity even if the Court should grant the petition and reverse the Circuit Court's decision.

IV.

ALTERNATIVELY, STATE POST-DEPRIVATION REMEDIES, INCLUDING WORKERS' COMPENSATION BENEFITS, PROVIDE AN ADEQUATE POST-DEPRIVATION REMEDY.

Petitioners have urged the Court to grant the petition to review the issue of whether the state post-deprivation remedies available to petitioners satisfied due process under the Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981). While this issue was raised in the Circuit Court below by the respondents, the Seventh Circuit's decision in *Walker* was not decided on this basis and the Court should not grant the petition to review an issue not decided by the Circuit Court.

However, this issue does provide the Court with another reason for denying the petition as the state post-deprivation remedies which were available to petitioners satisfied due process. *Hayes v. Vessey*, 777 F.2d 1149 (6th Cir. 1985). Thus even if the Court should grant the petition and reverse the decision of the Circuit Court on the question of the existence of a duty, the respondents would still prevail under the theory of adequate state post-deprivation remedies. *Id.*

CONCLUSION

For the aforementioned reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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